Judicate West
Commercial Arbitration Tribunal

Adonnis Biafore and Sothyson Pa,

Claimants

v.

Final Award
Case Number 455564

Uber Technologies, Inc.; Rasier, LLC; and Rasier-CA, LLC

Respondents

I, THE UNDERSIGNED ARBITRATOR, having been duly designated in accordance with executed Arbitration Agreements entered into by the above-named parties on January 25, 2017 and April 18, 2017, respectively, and based upon the evidence and argument presented at a three-day hearing conducted on November 6, 8 and 9, 2017, conclude that a Final Award in favor of RESPONDENTS is warranted in accordance with the terms set forth below.

I. Essential Facts

This Award recites facts found by the Arbitrator to be true and necessary to this Award. To the extent that this recitation differs from any party's position, that is the result of the Arbitrator's determinations as to credibility, determinations of relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

This is a case brought by two "Uber drivers" who contend they performed services as employees for Uber,[1] but were improperly classified as "independent contractors," and were therefore wrongfully deprived of certain[2] employee benefits to which they were entitled under

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[1] Both Claimants contracted with Respondent Rasier-CA, LLC. In their evidentiary presentation, the parties did not differentiate among the three related Respondents to identify their respective rights and duties toward Claimants, and the need to do so is, in any event, obviated by the determination in this Award that there was no fault by any Respondent with respect to the issue submitted. For convenience of presentation, the three named Respondents, which are collectively referred to in this Award in the singular and as "Uber."

[2] The benefits at issue here are wage and hour benefits, and not workers' compensation benefits.

California Law. It is undisputed that Respondent in fact classified Claimants as independent contractors. The sole issue submitted for this adjudication[3] is whether they were wrong to have done so.

Each Claimant performed work – that of driving paying customers to their chosen destinations. Each did so using his own insured vehicle, for which he paid all expenses. Each also made use of a sophisticated, internet-based, application (the "App") designed by Uber to accomplish four things:

1. Enable App-using persons seeking rides ("Riders") to find nearby App-using persons willing to provide rides ("Drivers") at a pre-estimated fare agreeable to both.[4]

2. Enable adjustments to fares above a minimum base ("price surges") during periods or places of anticipated peak demand, thereby increasing Riders' likelihood of finding drivers when most needed, by (1) reducing demand from competing Riders and (2) increasing the supply of willing Drivers.

3. Enable easy payment of fares by pre-authorized automatic deduction from credit cards posted by Riders as a condition for their right to use the Rider App.

4. Enable Riders to rate Drivers, and Drivers to rate Riders, as a means for Uber to eliminate the extreme "bad apples" from both groups (i.e., very low-scoring people in either group), by "deactivating" the App as to them.[5]

Apart from the benefit of gaining access to screened, willing, nearby Riders to transport at a pre-arranged, financially covered, market-adjusted rate, App-using Drivers received one other, often indispensable, benefit as part of a package of Uber Services – the ability to transport the Riders under Uber's livery license, without the need to incur the cost or effort of obtaining one on their own.

The means by which Claimants acquired the use of the App was not complicated. The

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[3] This is the first phase of a bifurcated case. Whether there is a need for a second phase is yet to be determined.

[4] The estimated fare was (1) directly provided to the customer through the App, and (2) derived from a mileage/time formula exposed and known to the drivers, before either elected to undertake the journey.

[5] The purpose served by the scoring feature was that of providing a means of assuring both groups they are less likely, when arranging future rides through the Uber App, to be subject to the most extreme cases of dangerous, rude or otherwise offensive drivers or riders. This assurance, in turn, presumably enhanced the market for the Uber App; it raised the number of drivers willing to drive and riders willing to ride.

App was made available to any adult with a driver's license and insurance, and a sufficiently new and sufficiently safe[6] car of virtually any model, who passes a driver and criminal background check,[7] actually intends to put the App to some minimal usage,[8] and is prepared to accept the terms of a "Software License and Service Agreement". Claimants met those conditions and signed such an agreement (the "Agreement").[9]

Under the Agreement, Uber drivers had to agree to a number of things plainly designed to protect or enhance the App itself. That is, to make the App ***usable*** (by letting Uber show information about them to Riders)[10], ***improvable*** (by letting Uber collect and use certain personal data about the Drivers for business purposes, including marketing and service improvements), ***more efficient*** (by turning the App off during periods of time when they did not wish to drive Uber Riders at all, rather than leaving the App on and fail repeatedly to accept the resulting ride requests)[11] and ***less vulnerable*** to pilferage (by shielding the information they receive about Riders[12] from any use *other than* to provide transportation services through the App, and

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[6] As determined by a simple, half-hour, 19-point, Jiffy Lube inspection.

[7] Uber imposed vehicle safety and driver background checks as a condition for applying to become a user of the App in order to comply with requirements the California Public Utilities Commission imposed on it. Uber neither interviewed those applying to use the Uber-App, nor imposed any conditions for approval of the App other than those conditions needed to be compliant CPUC regulations.

[8] Those who obtained, but did not use the App to provide even one ride for an entire month, would find their App deactivated, to save Uber the inefficiency of servicing unused Apps.

[9] Pa electronically accepted "Software License and Online Services Agreement" (Exhibit 3) on January 25, 2015. Biafore electronically accented the same agreement on April 18, 2015. On December 10, 2015, Pa electronically accepted a slightly modified agreement (Exhibit 4). The two agreements did not materially differ as to any terms relevant to the analysis of this case. For simplicity, therefore, both are referred to herein collectively as "the Agreement."

[10] Upon the driver's acceptance of the request, the rider receives the driver's first name, license plate number, make of car, cell phone number and star rating

[11] Rampant use of the "ignore requests" rather than "turn off the App" method of rejecting Uber ride opportunities (during periods when a Driver was not seeking riders) would seriously slow down the time period for Riders to find willing Drivers, because the App is programed to give the opportunity to only one Driver at a time, letting time pass before the unaccepted opportunity passes from one driver to the next.

[12] Upon accepting the request, the Driver receives the customer's first name, cell phone number, location and destination.

refraining from sharing the App, or App data, with others).

The Agreement also set forth certain common commercial provisions designed to protect the Uber business generally. Specifically, Drivers could not disclose, or misuse, confidential information about Uber, or disparage it, or otherwise harm its "brand, reputation or business." They were required to indemnify Uber against claims by third parties for their own acts or omissions, and to maintain either worker's compensation insurance or occupational accident insurance of their own. Finally, unless they timely exercised an opt-out opportunity, they had to arbitrate, rather than litigate, a broad range of potential claims.

Finally, ***in those circumstances when*** Drivers chose to accept a potential passenger's Uber-App request for Transportation Services, they had to:

1. Pay a fee proportionate to the revenue the driver makes through its use – specifically, 20% of the gross fare, exclusive of tips (which were permitted).

2. Report any accidents occurring while transporting a Customer.

3 Meet minimal common sense standards of passenger driving. Specifically, (i) please the passengers enough to avoid falling below minimum average star-ratings from them, (ii) maintaining a driver's license and using it to (iii) drive Uber-App Riders or those they authorize, and only them, (iv) directly to their destination, without interruption or unauthorized stops, (v) in a clean and sanitary vehicle that is (vi) kept registered, insured, and in good and safe operating condition, and otherwise suitable to transport people, while (vii) maintaining high standards of professionalism, service and courtesy.

The Agreement did not, however, require the Drivers, expressly or by implication, to drive passengers or even make themselves available to do so. When Drivers did provide transportation services, they did so at their own behest, not Uber's. When, where, and even whether they drove Uber Riders was entirely the Driver's decision, without the need to obtain permission, or even provide notice of the decision, and without greater exposure to the risk of de-activation.

Nor did the Agreement require Drivers to devote the time they did drive to Uber. They could spend the time they are not transporting Uber App using customers by making money driving for passengers using an App of one of Uber's direct competitors, such as Lyft, and do so without violating any duty owed to Uber. The Agreement not only did not prohibit such activity, it expressly permitted it:

> "For the sake of clarity, you understand that you retain the complete right to … use other software application services in addition to the Uber Services."

Many, including Claimant Biafore, did just that. Pa did not, but only because of his own preference not to be inconvenienced by the effort to use competing applications

Finally, the Agreement neither specified, nor required or restricted, the hours a driver may spend driving. Drivers would decide minute to minute whether to spend the next minute "on the App," with the decision being determined by nothing other than their own whim or sense of their needs, or their adherence to their own private business plans, without any consideration of the effect of their plans on Uber or its welfare. Uber made those matters none of its business.

Claimants presented no evidence to the effect that the actual contractual obligations as practiced were in any way more onerous than those set forth in the Agreement. In practice, adherence to the Agreement was less demanding than what some of the ambiguous terms of the Agreement might otherwise indicate. "Maintaining high standards of professionalism, service and courtesy" meant, in context of its application, that Drivers needed to avoid being so abysmally bad that the market rating of customers they service put them in the ranks of the lowest 3% of their colleagues, and avoid angering individual customers to the point of the Driver becoming subject to serious or and/or repeated complaints of egregious conduct.

During the course of their contractual relationship with Uber, both Claimants pursued primary endeavors other than working as drivers – Pa to pursue courses leading to his goal of becoming a medical technician, Biafore to pursue his nascent musical career – and both used the App's complete scheduling flexibility as means of making money without interfering with their primary pursuits. Notably, they took advantage of this flexibility in almost opposite ways. Biafore would leave his home in Barstow to engage in spurts of 3-5 days of binge driving throughout the more lucrative area of Los Angeles and Orange Counties, alternating between the Uber App and the Lyft application in accordance with his own sense or instinct of which application would be more profitable at the moment. He viewed them, in his own words, as "interchangeable apps." Pa used the App less aggressively, preferring to restrict his location to the Long Beach territory where he lived, and to restrict his time to certain periods during the week that were compatible with his need to attend class and complete homework.

Neither Claimant gave thought to what it meant to be an independent contractor or an employee. Neither concluded that Uber had conducted itself in a way that was either unfair or contrary to their expectations.

Neither Claimant drove passengers for long. Biafore voluntarily stopped driving passengers after about five weeks, because he found it was profitable for him. Pa involuntarily stopped driving passengers after about 13 months, when Uber deactivated his App after discovering that Pa had a record of two drug-related misdemeanor convictions.[13]

Throughout the period of Claimants' contractual relationships with Uber, Uber was subject to a September 19, 2013, order issued by the California Public Utilities Commission that determined that Uber was a Transportation Network Company (a "TNC"). Among the requirements imposed on Uber as a TNC was the need to carry $1 million per occurrence liability insurance, the need to screen and refrain from contracting with specified criminal or adverse

[13] The propriety of this deactivation is an issue that has been resolved in another setting, and is not part of the submission for this arbitration.

driving records, and the need to have Drivers use a window placard as "trade dress" identifying their car with Uber during periods of time the Driver is using the App. Uber, in the words of its PMK, Mathew Sawchuk, complied with CPUC requirements "to a tee." Public Utilities Code section 5432(a) defines a TNC as an organization that "provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle."

II. Legal Analysis

To be an employee, one must meet two distinct conditions. At a minimum, that person must render services for an employer. *See*, S.G. *Borello & Sons Inc.* v. *Dept. of Industrial Relations, supra,* 48 Cal.3d 341, 349 (1989) ("One seeking to avoid liability has the burden of proving that *persons whose services he has retained* are independent contractors rather than employees") (emphasis added). In addition, that person must provide those services in a capacity other than that of an independent contractor. Labor Code Section 3357 is implicitly premised on both conditions. It provides: "Any person rendering service for another, other than as an independent contractor..., is presumed to be an employee."

Uber contends, at bottom, that Claimants met neither condition. Claimants provided services, but to Riders only, and not to Uber. Alternatively, even if they did provide services to Uber, they did not do so in a way that meets the criteria of an employee.

A. Claimants Never Rendered Services for Uber

Claimants failed to prove the essential element that they provided services to Uber at all. The services in this case are those of a ***driver***. Only two kinds of persons would have a need for (or interest in) obtaining driver services at all:

(1) Riders themselves (the ultimate consumer of those services); or

(2) Those who have created a business commitment to transport Riders, and need to fulfill that commitment by engaging Drivers as agents to perform the task.

Claimants contend Uber's conduct precisely fits the latter description – that it obtained driving services as the means to fulfill ***its own*** business commitment to transport Riders. But the evidence does not support that contention.

Uber was not, precisely speaking, in the business of providing rides, any more than a broker is in the business of providing property. It provided, instead, only exposure (albeit, very effective exposure) to the possibility that a rider will find a driver willing to provide a ride, and a driver will find a rider willing to be driven. The distinction is material. If an App-using Rider did not get a ride, he or she had no contractual entitlement to look to Uber for relief. That is because Uber never made a commitment to give Riders a ride nor Drivers a rider. Compare *JKH Enterprises v. Dep't of Industrial Relations* 142 Cal App. 4th 1046 (2006) (Defendant had contractual commitment to deliver packages to recipients who were its customers, and used

drivers to fulfill that commitment); *Ware v. Workers' Comp. Appeals Board*, 226 Cal. App. 3d 1288 (1991) (Golf caddies were employees of the golf club in part because "caddies were provided by the Club for its members").

The only persons who took on any contractual commitment to transport Riders in our case were the ***Drivers***. They made this commitment each time they accepted a request (offer) from a Rider to be driven pursuant to the App-revealed price estimate or formula. ***They*** are the ones in the business of transporting riders, however rudimentary that business may be. It is not Drivers who serviced Uber, but Uber who serviced Drivers. The Drivers, therefore, are not its employees, but its customers.

Uber's manner of connecting Drivers to Riders was therefore not authoritarian. It did not need to be. Having no obligation to give Riders rides, it had no need to assign Drivers to Riders. Instead of assignments, it issued leads. It did not make drivers give rides to Uber riders; it let them. The difference is basic. A driver given an assignment receives a task he or she must perform. A driver given a lead receives an opportunity he or she may freely chose to use or discard. Among the more significant provisions of the Agreement is the one that was not there. There were multiple contractual obligations imposed on Drivers; none consisted of an obligation to drive the Riders.

All of the contractual requirements pertaining to the activity of driving itself come down to this summary: If driver chooses to do the job, he or she takes on specified obligations to do the job right, but the Driver's relationship with Uber is not one where he or she has to do the job to at all. Even the specified driving obligations are minimal,[14] and perfectly consistent with what a rational driver would do on his own as an entrepreneur to please customers and maximize his own business within the confines of the law.[15] More importantly, they are, on inspection,[16]

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[14] Claimants correctly contend not that the provisions are very restrictive, but that they do not have to be, when the work activity at issue is simple enough to be performed without significant control. It is only because we are in the realm of these seriously reduced standards of control that the minimal provisions rationally needed to protect the value of an App could even potentially take on the appearance of directives strong enough to give rise to purported employment.

[15] One driving requirement, that the Driver display a placard with the Uber icon when using the App, was set forth in the Agreement in order to comply with CPUC requirement that Uber drivers do so. The law is clear that controls instituted by the company to remain in compliance with the law do not count as indicia of control for purposed of determining the employment status of the worker. *SIDA of Hawaii, Inc. v. NLRB*, 512 F.3d 853, 862-863 ("the fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship").

[16] See page 3 of this Award, hereinabove.

perfectly consistent with what a rational App-provider would want a Driver to do to meet the App-provider's limited interest in protecting the value of the App. That is, the App's value is inherently commensurate with both the willingness of both Riders and Drivers to use it, and Riders will be less likely to use it to the extent they are burned by bad experiences with Drivers.

The language of the Agreement presented for review and signed by Claimants, is consonant with this understanding. It is labeled, without straining credulity, a "Property Use and Services Agreement." The "Services" referred to are not those of Drivers to Uber, but always the converse: Uber services the Drivers. What Claimants attempt to characterize as conditions of employment, are, in the language of the Agreement, consistently framed as conditions for continued entitlement to use the App. It is not unusual in intellectual property license agreements to specify conditions for the continued right to use the license, to the extent needed to protect the value of the intellectual property. The Agreement itself makes reasonably clear that this is the policy behind the conditions for use – the Drivers are referred to throughout the agreement as "Users" (of the App); and the omnibus provision is a requirement that Users refrain from any conduct "harming the brand."

Claimants correctly point out that Uber made money only if a ride occurred. They ask that the Arbitrator draw the conclusion from this that Uber had a need (or interest in) making drivers provide rides -- Uber, after all, is certainly in the business of making money. Cf., *Yellow Cab, supra*, 226 Cal.App.3d at pp. 1293–94. ("The enterprise could no more survive without them [the drivers] than it could without working cabs.") However plausible that conclusion may be in ordinary circumstances, it cannot be drawn here. The distinctive feature in this case is that discarded leads did not materially impair Uber's opportunity to make money. *Its revenue literally did not depend on any given driver providing a ride.* It depended only on the likelihood that *some* driver would do so. That is, it could make rides occur (or at least highly likely to occur) without making any driver provide a ride. And it could (and did) make rides more likely to occur by strategically adjusting the rates upward ("surging the price") when needed to increase the pool of willing drivers.[17] Surges happened frequently, and some drivers strategically adjusted their schedules and locations to take entrepreneurial advantage of them when they did. When they did so, they did so by choice, because it fit their own business needs, and not by contractual compulsion. Without such compulsion, the truism that Uber's survival depended on enough Drivers collectively engaging in the act of driving has no greater bearing on the question of the

[17] Uber also occasionally instituted guaranteed minimum hourly rates as a separate incentive to increase the number of drivers in a given high-demand time period or location. The fares in these circumstances were ordinarily great enough that the driver's income per hour could be expected to exceed the guaranteed hourly rate price in any event. It was only for purposes of meeting the conditions for eligibility for the minimum guarantee that Drivers ever faced a "requirement" that they drive the full hour for which they would be seeking a guaranteed minimum. This was not a prominent enough part of the Uber model to support a contention that Drivers were hourly workers, or that Uber, and not the passenger, was the "payor."

drivers' employment status than the equally accurate truism that Uber's survival depended on enough Riders collectively engaging in the act of riding.

Claimants also correctly point out that the Drivers did not control the price.[18] No private party, not even a perfectly free agent, ever does. Drivers did control the price *at which they will work*, and that is what matters. Like a bidder for goods in an auction, (or like an App-using Rider) they had the option of withholding the "sale" of their service until the price, for them, was right.[19]

Apart from the challenges otherwise referred to herein, Claimants present two primary challenges to the contention that they were not employees because they did not service Uber.

1. They challenge the core premises that Uber neither provided rides to Riders, nor had any need or interest in engaging the services of any Driver, by pointing out that a CPUC Order to which Uber is subject defines Uber as a Provider of Transportation Services, and CPUC Orders are binding on the parties subject to them.

2. They argue that the salient features Respondent use to resist the employment classification in this case also exist in analogous cases, in particular, *Borello, Yellow Cab and Linton*, which specifically found that the workers were employees.

1. Claimants' CPUC-Based Argument

In 2013, the California Public Utilities Commission issued an order (the Order) that, among other things, classified Uber as a transportation network company ("TNC"). Public Utilities Code section 5432(a), in turn, defines a TNC as an organization that:

> "provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle"

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[18] Respondent's characterization of the App-generated price as merely the "default price" is not supported by the evidence. There was anecdotal evidence of rare occasions in which Riders bargained Drivers down from the stated price, none in which Drivers bargained Riders up, and the propriety of any bargaining up would appear doubtful in light of the fact that the bargaining would have had to occur after the Rider had accepted the ride in reliance on the stated estimate.

[19] Unlike the typical employment situation, and more like a broker or even a joint-venture situation, the parties had no adverse interests with respect to the price – both had an aligned interest in the price being as high as the market would reasonably bear. This factor is not dispositive – an aligned interest in high prices exists in sharecropper settings, such a *Borello*, where an employment relationship was nonetheless found, at least for workers' compensation purposes. It did, however, contribute to *Borello* being a closer case on the merits than otherwise.

Claimants note that the findings set forth in a CPUC order are binding on the organization to which it is directed, and contend that the finding that Uber is a TNC bars it from contending that it is not in the business of providing rides to passengers.

The problem with this contention is this. Whether Uber provided rides to passengers is an empirical question, addressed at the hearing, and the evidence is that Uber did not. This evidence can be reconciled with the Order by recognizing that the statutory definition "provides...transportation services...using an application...to connect passengers with drivers...." does not necessarily imply that a TNC provides rides to passengers. The definition, properly construed, is entirely consistent with the more limited role Uber in fact played.

Specifically, the statutory definition uses the phrase "provides...services" without specifying "to whom?" The proper answer is, "to Drivers and Riders."

Moreover, the "services" were "transportation services" in the sense that they played a part within the transportation industry, to wit, the limited part thereafter specified in the definition itself: "[connecting] passengers with drivers," and only that.

Finally, while Uber did not "*use* the application" (emphasis added) in the ordinary sense of the phrase, neither side in this case contends that it did. This phrase, in context, is an inartful way of saying what Uber indisputably *did* do: provide an application for use by the passengers and drivers to be connected.

In recognition of its own limited purpose for classifying Uber as a TNC – that of giving it regulatory jurisdiction so as to promote public safety – the CPUC expressly commented that that it did not intend that classification necessarily imply that the drivers associated with the TNC's are the TNC's employees. This comment is not dispositive of the issue. It nonetheless carries some weight in that the only likely basis on which the CPUC would have been concerned that its ruling ***may*** relate to the employment classification issue would be if a party were to mistaken the statutory phrase "provides transportation services" to mean the App provider took on duties toward passengers for which it would have the need to hire drivers.

For these reasons, the Arbitrator finds Claimants' CPUC based argument to be unpersuasive.

2. Claimants' Case Authority Based Arguments

a. *Borello*

Borello, supra, is an extreme example of how little control an employer can exercise, and still have its workers classified as employees. But it is not as extreme as our case. There, workers had complete discretion over how they picked cucumbers, and when precisely they would do so. But they did not have the discretion not to pick cucumbers at all. In the words of *Borello* itself,

they were "engaged" to pick cucumbers. Picking cucumbers was their "function." Not so with Claimants herein. Without any arguable breach of their Agreement, Claimants could freely choose not only how and when to work, but whether to work at all.

b. *Yellow Cab*

A stronger, but still unavailing, case for Claimants is *Yellow Cab Coop. Inc. v. Worker's Comp. Appeals Bd.*, 226 Cal. App. 3d 1288 (1991). Yellow Cab leased cabs to drivers in uniform ten-hour shifts, on an automatically renewable weekly basis, for a daily rate of $56 (about $125 in current value). The payment covered use of the cabs, plus all maintenance and medallion fees, and dispatch services. In that case, as here, there was no contractual provision making drivers work. The company had a plausible argument that it was not in the business of providing rides; it was in the business of renting cabs. Not only did it not contractually control the way their "lessees" drove, or whether they did so, it appeared to be positioned, at least in the short run, to be indifferent to whether riders were driven at all – the source of the company's payment, unlike Uber's, came directly from the cabbies, at the front end, not from riders, at the back end.

Yellow Cab can nonetheless be distinguished by the stated rationale of the case itself. Economic compulsion of the rental fee, combined with the inability to use the rented cab for any purpose *other than* cab driving, was, the court found, the equivalent of a contractual obligation to drive. Yellow Cab Drivers could not refrain from working, and working a full shift, whether they felt like it or not, without the penalty of a certain and substantial loss. (Uber drivers, by contrast, could refrain from driving, anytime, with impunity.) Moreover, the actual requirements imposed on the drivers, though not set forth in the agreement, were quite controlling and restrictive. Among other things, drivers could be terminated if the cab were returned more than two hours late. They were directed by dispatchers where to go, and rejection of such direction would make them ineligible for the next available assignment, the Court commenting, "This was apparently designed to coerce drivers into accepting assignments whether or not they found them profitable enough to deserve their attention." Drivers would sometimes be told to "bring the cab back to the yard," and be subject to termination if they disobeyed. Finally, unlike our case, they were prohibited from working for other companies, leading the Court to note: "A mere lessor has no interest in restricting the lessee's freedom to render service to another." Based on this evidence, the Court found that "the parties' relationship contemplated more than the performance of their formal agreement." Specifically,

> If Yellow were only contracting for the "particular result" set out in the lease, it would be concerned with little more than collecting rent and protecting the leased property. Instead, it had an obvious interest in the driver's performance as drivers. To protect that interest, it treated them as employees.

There is an oddity in *Yellow Cab*, in that the Court finds from the defendant's conduct that it had an obvious interest in the drivers' performance as drivers, without telling us what that interest was. Its not telling us does not detract from the fact that it found there was such an interest, a key distinguishing feature from our case.

c. *Linton v. DeSoto*

Similarly, in *Linton v. DeSoto Cab Company, Inc. No. A146162m 2017b LEXIS 873(2017)*, the California Court of Appeal found an employment relationship in circumstances in which defendant, DeSoto, leased cabs to drivers on a monthly basis in 10 hour shift increments, with a "gate fee" of approximately $100, to cover the cab and dispatch services, payable at the end of each shift. The agreement was expressly denominated a "lease agreement," and contained language disclaiming any employment relationship. The drivers were required, as a condition of their use of the cab, to perform some services on a discounted basis, but in two major respects, they appear to have enjoyed, if anything, more freedom of action than the drivers in *Yellow Cab*: the drivers could freely reject specific rides assigned to them by the DeSoto dispatch service; and they may have been free to compete -- the Court did not address (and therefore did not rely upon) the competition factor. Nonetheless, the economic compulsion inherent in shift work (with each shift beginning with the driver having to check in to get the keys for the cab), the company's monitoring of drivers' conduct via internal and external monitoring devices, and a mandatory (albeit short) three-hour training program, were, the Court concluded, sufficient control to warrant an employee classification.

At first blush, *Linton* would appear to challenge the core principle that to be an employee, one must, by definition, render services to the employer. The Court recites the defendant in *its* case understating the consequence of a failure to prove such service. "Defendant contends it did not bear the burden of proof because plaintiff did not prove he rendered service to defendant." To the extent that rendering such services is definitional, of course, the absence of that element does not just shift the burden of proof, it determines the issue, and does so regardless of what "other factors" may be present. The *Linton* case itself resolves the issue not by issuing a revolutionary holding that one can be an employee without being a service provider to the employer, but by the less exceptional means of finding that the plaintiff in its case in fact rendered such services.[20]

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[20] *Linton* also arguably rejects the distinction between workers' compensation cases and wage & hour cases for purposes of determining employment status, noting that both kinds of cases, unlike third party claim cases, apply more liberal standards for determining employee status, in deference to the remedial nature of the statutes giving rise to the determination. It is unclear whether *Linton* holds that worker's compensation and wage and hour cases should yield identical results in all circumstances. Its primary reference to the issue is more couched than that: simply that the factors set forth in *Borello*, a worker's compensation case, are still relevant to *Linton*, a wage & hour case, despite the distinction. The policies underlying the two statutory schemes, while sharing the common characteristic of being remedial, are certainly not identical. This Award, in any event, does not rely upon a material distinction between the two policies in any event, in part because the issue does not need to be reached in order to resolve this case.

d. *Alexander* and *JKH Enterprises*

The cases of *Alexander v. FedEx Ground Transportation Systems, 765 Fed3d 981 (9th Cir.2014)* and *JKH Enterprises, supra,* are even more readily distinguished. *Alexander* involved driving in shifts in a FedEx branded truck, delivering packages on a preset schedule, meeting deadlines as an indispensable way of enabling the employer to meet contractually specified time commitments it had made to its customers. *JKH Enterprises* involved drivers servicing a set group of the employer's customers to whom the employer had guaranteed deliveries, either in shifts or on 2-4 hour special deliveries, all within the same route or territory, as directed by the employer.

Neither case comes close to the free-lance opportunity of the Uber drivers to retain control each day over how he or she spends that day.

The absence of service to Uber arguably supports a conclusion that the Drivers' relationship to Uber did not even rise to the level of independent contractor. The Arbitrator stops short of that conclusion for two reasons: (1) the parties themselves defined their relationship as that of independent contractor in their Agreement, and, for reasons set forth in more detail later this Award, there are particular reasons to give significant weight to the parties contractual expressions in this case; and (2) Uber otherwise honored at least one of the important formalities consonant with the premise that the Drivers were independent contractors – it issued them 1099 forms for their earnings.[21]

B. The Drivers Did Not, in any Event, Service Uber as Employees

As an alternative ruling, the Arbitrator finds that the Drivers did not, in any event, meet the applicable test of acting in the capacity of employees, even if their role could somehow be construed as rendering services to Uber. This conclusion is necessitated by the application of the so-called *Borello* factors, even if we were to begin, for argument's sake, with the assumption that Uber bears to burden of proving the independent contractor relationship.

The application of the factors is not highly administrable. Factors, by their nature, are less administrable than standards. Moreover, the weight given to each factor is itself subject to contextual variation. As was recited in *Borello* itself (citing earlier authority), the individuals factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." Id. at pp. 350 – 351. Nonetheless, a reasonable application of the factors in this case points convincingly in the direction of an independent contractor status.

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[21] The Arbitrator also takes note of the dispositive fact that the arbitration submission in this case is limited to that of determining which of the two categories – employee or independent contactor – is applicable to the parties' relationship. The implicit stipulated premise is that the relationship is at least that of independent contractor, and the Arbitrator honors that premise.

Borello looks first to the key question of the principal's control over the details of the work, and then to so-called "secondary indicia," consisting of:

> (1) Whether there is a right to discharge at will;
>
> (2) Whether the one performing services is engaged in a distinct occupation or business;
>
> (3) The kind of occupation, in particular, whether the work is usually done under the direction of the principal or by a specialist without supervision;
>
> (4) The skill required in the particular occupation;
>
> (5) Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (6) The length of time for which the services are to be performed;
>
> (7) The method of payment, whether by the time or by the job;
>
> (8) Whether or not the work is a part of the regular business of the principal; and
>
> (9) Whether or not the parties believe they are creating the relationship of employer - employee.
>
> (10) Whether the worker had an opportunity for profit or loss depending on his managerial skill.[22]

1. The Control Factor

The control of the worker over the details of his or her own work has traditionally been the most significant of the factors determining with nature of the relationship. *Borello* made a significant exception, drastically reducing the significance of the control factor in circumstances

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[22] This final factor, listed here as one of the "secondary indicia," is presented in Borello itself as one of six factors in the "Six-Factor Test" from other jurisdictions that the Borello court recited and made use of in its own decision. This Award does not recite and separately analyze the other five factors of the "Six Factor Test" because the Arbitrator concludes those five factors are redundant with identical factors already included within the "secondary indicia" otherwise analyzed herein. Those factors caddies were provided by the Club for its members are: the worker's investment in the tools or equipment; whether the work requires special skill; the degree of permanence of the work; and whether the work is an integral part of the company's regular business.

where the nature of the work itself is simple enough that it can be readily done without either expertise of supervision. The facts of *Borello* supplied the extreme example of such simple work: harvesting cucumbers.

It is not seriously disputed that Uber had a "hands off" approach when it came to supervising the activities of the Drivers. Whether the acknowledged absence of control is a significant factor turns on the question of whether the work of the Driver was simple enough dispense with the need for control. Claimants contend that it was. They make a plausible case by defining the "work of the Driver" as limited to the activities they undertake once they pick up a rider. When the focus is limited to that aspect of the work, the job is accurately described as very rudimentary – it requires no more skills than those already possessed by any reasonably courteous 16 year old in California. Were this the proper focus, the control factor would be entitled to little weight.

The "work of the Driver" is, however, more reasonably defined as all those activities that affect the worker's earnings. Thus defined, the work is far less rudimentary. The difference between either suffering outright losses, or making relatively decent returns, depends on a number of entrepreneurial decisions that require at least some review of data, some analysis, and consistent strategic application of a plan of action. Even without reaching the higher levels of whether to invest in the higher returns of driving an "XL" vehicle, these decisions range from whether and what kind of car to invest in, to whether to seek out surges, and if so where and when to take advantage of them, to whether to "mix Apps" (e.g., the Lyft App vs. the Uber App), to whether the respond at all to a given lead, increasing wait times in return for possible more lucrative fares. Neither Pa nor Biafore succeeded at their jobs. Biafore invested in the wrong car and otherwise apparently had a bad business plan, and he folded his operation in about five weeks. Pa kept at it for a year, without intending to take advantage of a host of potential ways the Uber App could have made him wealthier with the same invested time. The possibility of failure, or of falling short of greater available potential, is symptomatic of a job with more inherent complexity than the *Borello* court faced in its case.

The control factor in this case should therefore be assigned at least a moderate level of importance, and the absence of control by Uber weighs in favor of Uber.

2. The Right to Discharge at Will Factor

It is undisputed that the Agreement provided Uber a right to terminate the Driver's use of App at will, upon one week's notice, and this is a factor weighing against Uber.

In the context of a case in which there is significant control over the worker, the Right to Discharge at Will carries significant weight as a factor. That is because the threat of being fired without recourse eliminates any ability of the worker to be lax in his or her compliance with the company dictates to which that worker is subject. See, *Ayala v. Antelope Valleys Newspapers, Inc.*, 59 Cal.4th 522 (Cal. 2014). But the weight of any factor needs to be judged in combination with other factors, and the right to fire at will, when considered in combination with the

extraordinarily "uncontrolling regime" of Uber, carries little weight. No Uber driver lives in fear of having the App deactivated for artificial infractions such as returning a cab two hours late, or refusing an order to return to base. As a practical matter, the only circumstances where the Right to Discharge is in fact exercised are those extreme circumstances of customer dissatisfaction great enough that there would be little prospect of the driver having a successful business as a driver in any event.

3. The "Distinct Occupation or Business" Factor

For the reasons set forth in section 1, hereinabove, each Uber driver had at least a "distinct business." This factor therefore weighs in favor of Uber. The magnitude of the weight is moderated by the fact that it overlaps somewhat with the control factor analyzed above, such that to give the "distinct business" factor full weight as a separate factor would be to overweigh it.

4. The Factor of Whether the Work is Usually Done under the Direction of the Principal or by a Specialist without Supervision

Neither driving passengers, nor making the entrepreneurial decisions needed to make one's own enterprise of driving passengers successful, is inherently complex enough to rise to the level where it ordinarily needs a specialty background or direction from a principal having that background. This factor therefore weighs against Uber. The relevance of this factor appears to be largely that the absence of control (the first factor) is more significant to the extent the work by its nature, is complex enough to require direction. To the extent that fact has been taken into consideration in discounting the weight of the control factor (and it has), the "direction of the principal" factor is entitled to little additional weight as an independent factor.

5. The "Required Skill" Factor

For the reasons stated above, the task of transporting passengers from one location to another requires no particular skill, but the job of devising and adhering to a business plan to maximize the financial potential of using the App to transport passengers requires at least a modicum of skill. The latter is nonexistent where the driving job takes place within set hours, at uniform rates, in a limited geographic territory. *Compare, Litton, supra,* ("No skill other than driving a car that is required in this case.")

It is not, however, the skill level that Uber can properly tout as a particular factor calling for an independent contractor status. As is true of small-business jobs generally, the skill level required for success is both above some jobs, and below other jobs, that are for other reasons readily classified as employee jobs. Its impact as a stand-alone factor on the ultimate determination of this case appears negligible.

6. The "Instrumentalities, Tools, and Place of Work" Factor

Uber supplied no car, no iPhone, and no place of work. It did supply the App, the license, and most of the insurance. The tools supplied by both parties were indispensable to the Drivers' ability to transport passengers.

Judged by cost on a per driver basis, the Driver's contribution of tools was greater. Claimants contend that it is only the marginal costs of driving the car (or the iPhone) that should "count" toward the drivers' contribution. The proper method, however, is to account for those costs on a fully allocated basis, adjusting ratably for any portion of mileage (or phone time) used privately or on other business.

The "tools" factor favors Uber. The significance of that factor is, however, substantially reduced by the fact that although the Drivers' contribution is greater, both sides contributed materially to the total assemblage of required tools.

7. The "Length of Time for which the Services were Performed" Factor

A key characteristic of the Drivers' job was that there were no season-long stretches between pockets of vacation, and even work on a given day could not be measured by standard shifts. The unit of "services performed" in the Uber context was the ride. It was only for the duration of any ride that Drivers had any arguable work obligations. The length of time for any "performance of service" was therefore about 20 minutes on average, a fact that weighs significantly in favor of Uber.

8. The Method of Payment Factor

The method of payment was by the job and not by the hour. While not unique to independent contractors (agricultural employees are often paid "piece rate"; professional independent contractors are often paid by the hour), this factor favors Uber. It is by virtue of payment by the job, combined with discretion over *which* jobs to undertake (when and where to pick up rides, and some discretion to reject particular rides) that the Drivers have more personal control over their economic destiny than is ordinarily true of employees). This factor favors Uber.

9. The Factor of Whether the Work Is Part of the Regular Work of Principal's Business

If we start with the premise adopted for purposes of this section of the Award – that Drivers were servicing Uber when they provided rides for which Uber earned a commission – that work was "part of the regular work of Uber's business." Indeed, it was tied to the only way in which Uber made money for this aspect of its multi-faceted enterprise.

This factor has less weight, however, than it would in the ordinary context where a business owner has regular work to be performed. An apartment complex manager who hires a handyman to perform the year-around work of assisting in the manager's business of maintaining the property would have a harder time classifying that handyman as an independent contractor than would a homeowner who engages the same person to perform the same kind of work to spruce up the home for the day.

The Uber-driver's work does not fall cleanly into either of those categories. The weight to be given this factor, therefore, is equivocal.

10. The Factor of Whether the Parties Believed They Had Created an Employer-Employee Relationship.

The next factor – what the parties in fact thought their relationship was at the time the work was being done – favors Uber, and is entitled to greater weight than it would receive in other contexts.

The nature of the Drivers' work experience as Uber drivers, in terms of the core issue of the freedom to determine how they spent their own time (not only from day to day but from minute to minute) was unlike anything either Claimant had experienced as part of earlier regular employment. There was nobody to "check in with," and nobody to "tell them what to do."

The Agreement was consistent with this experience. Its legal relevance remains the same whether they chose to read the language or not. The language not only recited that they were independent contractors; it contained no provision whatsoever imposing any service obligations on any of them. Its title was "Software License and Service Agreement." The "service" in question consisted entirely of Uber's services (for which it earned the 20% fee). The Drivers were consistently referred to as "Users" (of that license and those services). The only "principal-agency" provision consisted of the Drivers in the role of principals appointing Uber as their agents, for purposes of any needed fee collection vis-à-vis delinquent Riders.

Contract language is appropriately disregarded where it terms are inconsistent with the actual conduct of the drafter. See, e.g., *Yellow Cab, supra* ("Despite its recital to the contrary, the lease here did not fully and accurately define the parties' relationship.") That is not the case here.

11. The Factor of whether the Worker Had an Opportunity for Profit or Loss Depending on His Managerial Skill

As has been stated above, Drivers could either do poorly or reasonably well financially depending a range of decisions they made concerning among other things, the choice of the optimal vehicle and the timing and location of their driving activities. These decisions are not based on extraordinarily sophisticated analysis, but they are inherently managerial in nature. This final factor therefore weighs significantly in favor of Uber.

In sum, *Borello* factors number 1, 3, 6, 7, 8, 10 and 11 favor Uber. Factors number 2 and 4 favor Claimants. Factors number 5 and 9 are equivocal. Giving due consideration to the direction of these factors, and taking into account the weight to be assigned to each, the Arbitrator finds that Uber meets the burden of proof for a finding that Claimants acted in the capacity of independent contractors, not employees.

III. Status of this Final Award

This Final Award adjudicates the issue submitted at the November 2017 hearing. That issue is the determination of whether Claimants worked in the capacity of employees or of independent contractors. The November 2017 hearing, in turn, constituted the first phase of a bifurcated hearing. It is because this Award addresses only the issue submitted at the first phase that it is styled as a "Final Award." The intended effect of a final award is to (1) permit confirmation and enforcement of the award as to the claim adjudicated, while (2) retaining arbitral jurisdiction to address any remaining matters unrelated to the adjudicated claim.

The need for a second phase would have been obvious if the first phase had been resolved in Claimants' favor. In that circumstances there would have been a potential need to adjudicate the issue of damages, if any, resulting from a failure to treat Claimants as employees.

The Arbitrator has issued this award as a Final Award not because he has determined there are other issues to be addressed, but because he cannot preclude the possibility that there are. He therefore retains jurisdiction to address any remaining issues, unrelated to the issue resolved herein, that may exist. In the event both sides conclude there are no further matters to be resolved in this case, they are requested to submit written notice to that effect to the Case Manager, in which case the substantive content of this Final Award shall be issued as a Final Award.

Final Award

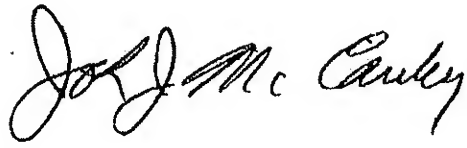
Based on these considerations, the Arbitrator awards as follows:

1. The Arbitrator hereby declares that Respondents Uber Technologies, Inc.; Uber Technologies, Inc.; Rasier, LLC; and Rasier-CA, LLC, and each of them (collectively "Uber"), at all times properly classified and treated Claimants Adonnis Biafore and Sothyson Pa ("Claimants"), and each of them, as "independent contractors" and not as "employees" in connection with the work each Claimant performed using the Uber application.

2. The claim that Uber violated Claimants' rights by classifying Claimants as independent contractors and not as employees (the "Claim") is the sole claim submitted at the first phase of this bifurcated hearing. As to that Claim, this Final Award constitutes the full and final resolution.

3. The Arbitrator reserves jurisdiction to adjudicate any remaining issues.

Dated: January 22, 2018



John (Jay) McCauley
Arbitrator

PROOF OF SERVICE

I am employed in the county of Orange, State of California. I am over the age of eighteen and not a party to the within action, and my business address is: 1851 E. First Street, Suite 1600, Santa Ana, CA 92705

On January 25, 2018, I served the following document: **FINAL AWARD** in the interested parties in the matter of **GILBERT AQUINO, ET AL. VS. UBER TECHNOLOGIES, INC., ET AL.** by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

__X__ I am readily familiar with the business' practice for collection and processing of correspondence and mailing with the United States Postal Service; such correspondence would be deposited with the United States Postal Service the same day of deposit with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business.

__X__ By electronic mail on **January 25, 2018**

___ By Facsimile, on _____ I faxed such document from our facsimile telephone number (714) 834-1344 to the offices of the parties as stated on the service list. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error.

__X__ (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

___ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **January 25, 2018,** at Santa Ana, California.

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